(11)

No. 96-827

# In the Supreme Court of the United States

OCTOBER TERM, 1996

LEONARD ROLLON CRAWFORD-EL, PETITIONER

*v.*

PATRICIA BRITTON

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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34 pp

## QUESTIONS PRESENTED

In this case, petitioner seeks damages from a public official who performs a discretionary function based on a constitutional claim that requires proof that the official acted with an impermissible intent. The United States will address the following questions:

1. Whether, in such a case, an official claiming to have acted for a legitimate reason is entitled to summary judgment if the official shows that it would have been objectively reasonable to have acted for that reason, and the plaintiff fails to produce clear and convincing evidence of an impermissible intent.

2. Whether, once a defendant files a motion for summary judgment in such a case, a plaintiff seeking discovery related to the defendant's intent must produce some evidence of an impermissible intent, and show that there is a reasonable likelihood that discovery will procure evidence that would permit a jury to find in the plaintiff's favor on the intent element.

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

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## INTEREST OF THE UNITED STATES

The United States has important interests in the law relating to qualified immunity, including the standards at issue in this case. Qualified immunity applies in civil actions against federal personnel in their personal capacities for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), as well as in civil actions against state and local officials in their personal capacities under 42 U.S.C. 1983. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 500-501 (1978). The United States often represents government employees in *Bivens* actions and has an interest in protecting such employees from meritless and unduly burdensome litigation. Approximately 500 *Bivens* cases are filed each year against personnel of the United States Bureau of Prisons (Bureau or BOP) alone, and the vast majority of those

claims are unmeritorious. The United States also has an interest in ensuring effective deterrence of unconstitutional conduct by government employees, and in ensuring that adequate remedies exist for violations of constitutional rights.

## STATEMENT

1. Petitioner was convicted of murder and is serving a life sentence in the District of Columbia's correctional system. Pet. App. 3a. In 1989, petitioner sued respondent Patricia Britton, a District of Columbia correctional official, alleging that she had violated his right of access to the courts by misdelivering several boxes containing his legal papers and other personal items. *Ibid.* Petitioner sought damages from respondent under 42 U.S.C. 1983, which provides in relevant part that "[e]very person who, under color of any [law] * * * of * * * the District of Columbia, subjects * * * any * * * person * * * to the deprivation of any rights * * * secured by the Constitution * * * shall be liable to the party injured."

The district court denied respondent's motion to dismiss and for summary judgment on qualified immunity grounds. Pet. App. 3a. The court of appeals reversed, holding that petitioner had failed to plead sufficient facts to put respondent on notice of the nature of his claim. The court remanded to permit petitioner to file a more specific complaint. *Id.* at 3a-4a.

2. On remand, petitioner filed a Fourth Amended Complaint, alleging an access-to-court claim and a due process claim. Pet. App. 4a. Petitioner also alleged that respondent had misdelivered his belongings in retaliation for various activities protected by the First Amendment. *Id.* at 28a-29a. The First Amendment claim is the only one at issue here.

With respect to that claim, petitioner alleges that, from October 1985 to April 1986, he had frequent contact with



respondent, and that she was hostile to him because he had assisted many inmates in filing administrative complaints. Pet. App. 29a. In April 1986, petitioner invited Washington Post reporters to visit him, and respondent approved petitioner's visitation request. *Ibid.* Naming petitioner as a source, the Post then published an article critical of Lorton prison conditions. The next day, respondent allegedly told petitioner that he had "tricked" her into approving the visitation request, and that she was going to do "everything she had to to make it as hard for him as possible." *Ibid.*

Between April 1986 and December 1988, petitioner filed several lawsuits against the District of Columbia. Pet. App. 30a. In December 1988, while the suits were pending, petitioner and some other inmates were transferred to the County Jail in Spokane, Washington. *Ibid.* During the transfer, prisoners were videotaped. When petitioner protested the taping as an invasion of privacy, respondent allegedly said, "[y]ou're a prisoner, you don't have any rights." *Ibid.*

Shortly after arriving in Spokane, petitioner spoke to a Washington Post reporter, and the Post published an article, quoting petitioner, that was critical of the transfer of D.C. inmates to Spokane. Pet. App. 30a. After publication of the article, respondent allegedly told an official of the Spokane County Jail that petitioner was a "legal troublemaker." *Ibid.*

Petitioner was then transferred from the Spokane County Jail to Lorton prison. Pet. App. 30a-31a. On his way back to Lorton, petitioner allegedly told respondent that he had turned over property to officials in Spokane that contained his legal papers. *Id.* at 31a. Petitioner alleges that respondent told him that the property would be sent to her. *Ibid.* When he returned to Lorton, peti-

tioner allegedly wrote a letter to respondent asking for the return of his property. *Ibid.*

Petitioner was then transferred from Lorton to a federal prison in Marianna, Florida. Pet. App. 31a. En route to Marianna, petitioner allegedly learned that some inmates returning from Spokane had received their property, and that respondent had called relatives of other inmates asking them to pick up inmate property because otherwise she would throw it away. *Ibid.* When petitioner called his mother, she told him that his brother-in-law had picked up his property, which allegedly upset petitioner because he believed he would have difficulty retrieving his property once it left the prison system. *Id.* at 32a.

According to petitioner's complaint, respondent told petitioner's brother-in-law that she was concerned that petitioner's property would be lost if she sent it to the Lorton Property office for mailing to petitioner and that federal prisons would not accept shipments of D.C. prisoner property. Pet. App. 32a. Respondent also allegedly told petitioner's brother-in-law that petitioner should be happy that she did not throw his property in the trash. *Ibid.* Petitioner's mother eventually sent petitioner's property to him at the Marianna, Florida prison. *Id.* at 32a-33a. Petitioner alleges that he had some difficulty obtaining the property because it had arrived outside prison channels. *Id.* at 33a.

3. The district court granted respondent's motion to dismiss the Fourth Amended Complaint. Pet. App. 115a-143a. The court held that the First Amendment claim failed to meet the District of Columbia Circuit's requirement that petitioner plead "specific *direct* evidence of intent." *Id.* at 128a (quoting *Kimberlin* v. *Quinlan*, 6 F.3d 789, 793 (D.C. Cir. 1993), vacated on other grounds, 515 U.S. 321 (1995)).



A panel of the court of appeals affirmed the dismissal of petitioner's access-to-court and due process claims, but suggested that the court consider petitioner's First Amendment claim en banc. Pet. App. 4a. The court agreed to consider that issue en banc, and ordered briefing on five questions, including whether the court should retain its "direct evidence" rule (requiring direct as opposed to circumstantial evidence of unconstitutional motive to overcome an official's qualified immunity defense), and, if not, whether there are any "alternative devices which protect defendants with qualified immunity, in cases of constitutional tort depending on the defendant's motive or intent, from the costs of litigation." *Id.* at 109a.

4. The en banc court vacated the dismissal of petitioner's First Amendment claim and remanded for further proceedings. Pet. App. 1a-95a. The court of appeals rejected its prior requirement that a plaintiff seeking damages from an official in his personal capacity must allege "direct" evidence of intent where the unconstitutionality of the official's action depends on that official's intent. *Id.* at 9a-12a (Williams, J.), 43a-44a (Silberman, J.), 58a (Ginsburg, J.), 72a (Henderson, J.). A majority of the court favored the adoption of alternative procedures that would protect defendants raising qualified immunity from the costs of litigating constitutional claims that depend on proof of the defendant's intent. *Id.* at 5a-21a (Williams, J.), 46a-50a (Silberman, J.), 58a (Ginsburg, J.), 72a (Henderson, J.).

a. In what is termed an "[o]pinion for the court," Pet. App. 2a, Judge Williams (joined by Judges Buckley and Sentelle) concluded that, "unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." *Id.* at 3a. Judge Williams viewed such a standard as

necessary to implement the goals of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Pet. App. 2a-3a.

Judge Williams noted that *Harlow* holds that, in order to surmount a qualified immunity defense, a plaintiff must show that the "defendant's acts violated 'clearly established statutory or constitutional rights.'" Pet. App. 5a. *Harlow* thus "*excluded* liability" where the right violated was not clearly established, "even when the official acted 'with the malicious intention to cause a deprivation of constitutional rights or other injury.'" *Id.* at 5a-6a. This Court reformulated the qualified immunity doctrine in that manner, Judge Williams explained, because liability predicated on subjective intent "opened up a wide field of inquiry, often with 'no clear end to the relevant evidence' bearing on the official's 'experiences, values, and emotions,' and typically not susceptible of disposition by summary judgment." *Id.* at 6a (quoting *Harlow*, 457 U.S. at 816-817).

Judge Williams did not read *Harlow* to preclude the assertion of constitutional claims that require proof of intent as an element of the claim, because such a reading "would eliminate any damage remedy even for 'egregious wrongdoing.'" Pet. App. 11a-12a. At the same time, two factors led Judge Williams to conclude that "the standard protection of summary judgment * * * leave[s] an exposure to both liability and litigation that is impossible to square with *Harlow*." *Id.* at 17a. First, "unconstitutional motivation is, as is often said of civil fraud, easy to allege and hard to disprove." *Ibid.* Second, the Court in *Harlow* regarded "the social costs of erroneously denying recovery" in officer suits that turn on subjective intent to be "exceeded by the combined social costs of (1) litigating and (2) erroneously affording recovery" in such cases. *Id.* at 18a. Judge Williams therefore concluded it was appropriate to impose a requirement that a plaintiff prove



unconstitutional motive by clear and convincing evidence. *Id.* at 18a-21a. Judge Williams noted that the imposition of such a heightened standard of proof was consistent with the application of that standard in several other contexts, including claims of civil fraud and defamation. *Id.* at 18a-21a.

Judge Williams also concluded that *Harlow* "allows an official to get summary judgment resolution of the qualified immunity issue, including the question of the official's state of mind, *before* the plaintiff has engaged in discovery on that issue." Pet. App. 3a. Judge Williams reasoned that, "[i]f the plaintiff can defer summary judgment while he uses discovery to extract evidence as to defendant's state of mind, *Harlow*'s concern about exposing officials to debilitating discovery will generally be defeated in constitutional tort cases dependent on improper motive." *Id.* at 13a.

b. Judge Silberman filed a concurring opinion, Pet. App. 35a-57a, concluding that, under the reasoning of *Harlow*, "when the defendant asserts a legitimate motive for his or her action, only an objective inquiry into the pretextuality of the assertion is allowed," *id.* at 46a. Under that approach, "[i]f the facts establish that the purported motivation would have been reasonable, the defendant is entitled to qualified immunity." *Ibid.*

c. Judge Ginsburg filed a concurring opinion, Pet. App. 58a-71a, agreeing with Judge Williams that a plaintiff should be required to establish unconstitutional intent by clear and convincing evidence, *id.* at 58a. Judge Ginsburg disagreed, however, with Judge Williams' view that there should be a *per se* bar to discovery on the intent issue before summary judgment. *Id.* at 58a-64a. Judge Ginsburg noted that a district court has discretion under Federal Rule of Civil Procedure 56(f) to permit discovery in response to a motion for summary judgment. *Id.* at 62a.

Judge Ginsburg concluded, however, that, "[i]n a case involving qualified immunity, the district court abuses this discretion if it fails duly to consider not only the competing interests of the parties—as in any civil litigation—but also the social costs associated with discovery had against a government official." *Ibid.* Judge Ginsburg therefore concluded that "[i]f, when the defendant moves for summary judgment, the plaintiff cannot present evidence that would support a jury in finding that the defendant acted with an unconstitutional motive, then the district court should grant the motion for summary judgment unless the plaintiff can establish, based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest, a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive." *Id.* at 63a.

d. Judge Henderson filed a concurring opinion, Pet. App. 72a-77a, in which she joined in the adoption of a clear and convincing evidence standard of proof, *id.* at 72a. Judge Henderson would have disposed of the present case, however, on the ground that petitioner's "constitutional claims are frivolous" and therefore subject to dismissal under 28 U.S.C. 1915(d). *Ibid.*

e. Chief Judge Edwards (joined by Judges Wald, Randolph, Rogers and Tatel) filed an opinion concurring in the judgment to remand the case. Pet. App. 78a-95a. Chief Judge Edwards concluded that the court had no authority to impose either a clear and convincing evidence standard of proof or any limits on discovery beyond those set forth in the Federal Rules of Civil Procedure. *Id.* at 80a.



## SUMMARY OF ARGUMENT

A. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court reformulated the common law qualified immunity defense in order to provide greater protection for public officials against the burdens of litigation and trial on unmeritorious claims. Under *Harlow*, officials performing a discretionary function are shielded from liability for damages when their conduct does not violate clearly established constitutional rights. *Harlow* eliminated the common law inquiry into an official's subjective good faith because too many insubstantial claims of bad faith resisted disposition through summary judgment and because that issue had led to broad-ranging discovery that was peculiarly disruptive of effective government.

Proof of an official's intent is also an element of many constitutional claims, and when the law on such claims is clearly established, *Harlow* does not by its terms preclude a plaintiff from bringing them. The protection given to public officials by *Harlow*, however, would be rendered ineffective if a plaintiff could simply allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thereby imposing on officials the very costs and burdens of discovery and possible trial on insubstantial claims that *Harlow* intended to spare them. Special standards are therefore needed to govern intent-based claims. Two rules best effectuate *Harlow*'s goal of preventing trials and burdensome discovery on insubstantial claims.

B. First, an official claiming to have acted for a legitimate reason should be entitled to summary judgment if the official shows that it would have been objectively reasonable to have acted for that legitimate reason, and the plaintiff fails to produce clear and convincing evidence of some other, constitutionally impermissible intent. As *Harlow* recognized, ordinary summary judgment standards often do not provide an adequate mechanism for

screening out unfounded allegations of impermissible intent. At summary judgment, the evidence produced by the non-movant must be credited and all reasonable inferences must be drawn in his favor. Thus, even when an official can demonstrate an objectively reasonable basis for a decision, plaintiffs with insubstantial claims can often cobble together evidence that would preclude an award of summary judgment. The threat of trial and possible personal monetary liability, based upon weakly supported claims of improper intent, can easily deter officials from acting with the decisiveness and judgment required by the public good.

A heightened summary judgment standard responds directly to that concern. When officials know that they can avoid a trial and possible liability so long as they can show that it would have been objectively reasonable to have acted for a legitimate reason, and plaintiffs are unable to produce clear and convincing evidence of an impermissible intent, the danger that officials will be deterred from taking action in the public interest is vastly reduced.

The Court has the authority to impose such a heightened standard. When, as here, Congress has not specified a standard of proof, this Court has the responsibility to prescribe one. In a typical civil suit for money damages, the preponderance of the evidence standard is ordinarily chosen. When the use of that standard would jeopardize important interests, however, the Court has imposed a clear and convincing evidence standard. Because intent-based constitutional damage actions threaten important government interests, when an official demonstrates that it would have been objectively reasonable to have acted for a legitimate reason, a heightened standard at the summary judgment stage is warranted.

C. Public officials also need heightened protection against unwarranted discovery on intent-based claims. As



*Harlow* recognized, discovery on intent issues can result in broad-ranging inquiries that are peculiarly disruptive of effective government. We do not agree with the view of some of the judges below, however, that discovery should be precluded in all cases once a summary judgment motion is filed. That rule would threaten to choke off too many meritorious claims. Instead, once a defendant files a motion for summary judgment, a plaintiff seeking discovery should be required to produce some evidence of impermissible intent and show that there is a reasonable likelihood that discovery will procure evidence that would permit a jury to find in the plaintiff's favor on the intent element. That approach will provide adequate protection for public officials against improvident discovery while still leaving room for discovery in meritorious cases.

That approach is also consistent with Rule 56(f) of the Federal Rules of Civil Procedure, which affords a district court discretion to permit discovery prior to ruling on a motion for summary judgment. In the present context, the district court's exercise of discretion under Rule 56(f) must be informed by the concerns that animated *Harlow*, and any discovery order that fails to take into account those concerns would constitute an abuse of discretion. Federal Rule of Civil Procedure 26(b) also supports the application of the discovery standard set forth above. It provides that discovery "shall be limited" when the "burden" of discovery "outweighs its likely benefit." Once a public official files a motion for summary judgment based on an objectively reasonable ground for his conduct, unless the plaintiff can produce some evidence of impermissible intent and show that discovery is reasonably likely to uncover sufficient evidence to support a jury finding in the plaintiff's favor, the "burden" of the proposed discovery categorically "outweighs its likely benefit."

## ARGUMENT

### IN CONSTITUTIONAL TORT CASES IN WHICH INTENT IS A NECESSARY ELEMENT OF THE CLAIM, PUBLIC OFFICIALS SHOULD RECEIVE HEIGHTENED PROTECTION AT THE SUMMARY JUDGMENT STAGE

#### A. Constitutional Tort Claims That Depend On Proof Of Intent Raise Special Concerns That Justify Heightened Protection For Public Officials At The Summary Judgment Stage

1. Under 42 U.S.C. 1983, a person acting under color of state or District of Columbia law who "subjects" any person "to the deprivation of any rights * * * secured by the Constitution" is "liable to the party injured." The basic purpose of Section 1983 is "'to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights' and to provide related relief." *Richardson* v. *McKnight*, 117 S. Ct. 2100, 2103 (1997) (emphasis omitted). Consistent with that purpose, Section 1983 has been construed to authorize damage actions against public officials in their personal capacities. *Monroe* v. *Pape*, 365 U.S. 167 (1961).

On its face, Section 1983 does not create any immunities from such suits. *Wyatt* v. *Cole*, 504 U.S. 158, 163 (1992). Nonetheless, this Court has recognized a qualified immunity for public officials who perform discretionary functions when similar defendants would have enjoyed such an immunity at common law or when important public policy concerns suggest the need for such an immunity. *Richardson*, 117 S. Ct. at 2103. That recognition rests on the understanding that the Congress that enacted Section 1983 was unlikely to have intended to eliminate well-established common law immunities or to impose monetary liability on government officials when



especially important government interests would be jeopardized. *Ibid.*

The doctrine of qualified immunity seeks to balance two competing concerns. On the one hand, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). On the other hand, such suits "frequently run against the innocent" and impose serious social costs. *Ibid.* Those costs "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Ibid.* Most significant, however, "is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Ibid.* The most important goal of qualified immunity is to remove that danger, so that the fear of litigation will not deter an officer with discretionary power from acting "with the decisiveness and the judgment required by the public good." *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974).

To accomplish that goal, the qualified immunity doctrine must be framed so that officers "reasonably can anticipate when their conduct may give rise to liability for damages," and so that "unjustified lawsuits are quickly terminated." *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984). Insubstantial suits must be "expeditiously * * * weed[ed] out * * * without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on the merits." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). Qualified immunity thus incorporates "an entitlement not to stand trial." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). And, whenever possible, discovery should not be allowed "[u]ntil

this threshold immunity question is resolved." *Harlow*, 457 U.S. at 818.

2. In *Harlow*, the Court reformulated the common law qualified immunity defense in order to provide greater protection for public officials against the burdens of discovery and trial on unmeritorious claims. Before *Harlow*, public officials were entitled to qualified immunity from damage actions when they had "reasonable grounds for the belief [in the legality of their action] * * * coupled with good-faith belief." *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978). That test frequently proved ineffective in resolving suits without a full trial because many courts did not view the question of an official's subjective good faith as amenable to disposition through a summary judgment motion. *Harlow*, 457 U.S. at 815. The inquiry into intent also raised special discovery concerns. Because the motivations of an official are inevitably influenced by the official's "experiences, values, and emotions," *id.* at 816, when intent is at issue, there "often is no clear end to the relevant evidence," *id.* at 816-817. Judicial inquiry into subjective motivation therefore can result in "broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues," which "can be peculiarly disruptive of effective government." *Id.* at 817.

Based on those weighty concerns, the Court in *Harlow* concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." 457 U.S. at 817-818. Instead, under *Harlow*, government officials performing discretionary functions are shielded from liability for damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The Court has since described *Harlow* as



having "purged qualified immunity doctrine of its subjective components." *Mitchell*, 472 U.S. at 517.

3. Proof of an official's intent, however, is also an element of many constitutional claims, including claims of unconstitutional discrimination, *Washington* v. *Davis*, 426 U.S. 229, 239 (1976), cruel and unusual punishment, *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994), and retaliation based on the content of speech, *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). When the law governing such intent-based claims is clearly established, *Harlow* does not by its terms preclude a plaintiff from subjecting an official who allegedly commits such a violation to a suit for damages. Such suits, however, can pose the very dangers that led the Court in *Harlow* to eliminate the subjective component of qualified immunity. The protection given to public officials by *Harlow* and related cases would be rendered ineffective if a plaintiff could simply "allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery and possibly trial that *Harlow* intended to spare them." *Siegert* v. *Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), aff'd, 500 U.S. 226 (1991). "[I]f by arguing that the defendants acted with forbidden intent the plaintiff may obtain exhausting discovery and trial, [*Harlow*'s] promise of a 'right not to be tried' is a hoax." *Elliott* v. *Thomas*, 937 F.2d 338, 344 (7th Cir. 1991), cert. denied, 502 U.S. 1074, 1121 (1992).

That does not mean that plaintiffs should be precluded from bringing constitutional claims that depend on proof of an official's intent. Because many of the most egregious and clearly established constitutional violations are those that depend on proof of intent, that result could not be reconciled with Section 1983's basic purpose of "'deter[ring] state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights'

and to provide related relief." *Richardson*, 117 S. Ct. at 2103 (emphasis omitted). At the same time, because suits that depend on proof of intent threaten to resurrect the very state of affairs that led the Court in *Harlow* to reformulate the doctrine of qualified immunity, special standards are needed to govern intent-based claims. The difficult question is what form such protection should take. The different approaches suggested in the opinions below attest to the difficulty of that issue.

In the past, we have advocated various solutions to the problems posed by intent-based constitutional claims. In light of experience and the decision below, we now believe that two rules best effectuate *Harlow*'s goal of preventing trials and burdensome discovery on insubstantial claims, while at the same time allowing meritorious claims to proceed. First, to guard against trials on unfounded intent-based claims, an official claiming to have acted for a legitimate reason should be entitled to summary judgment if the official shows that it would have been objectively reasonable to have acted for that legitimate reason, and the plaintiff fails to produce clear and convincing evidence of an impermissible intent. Second, to guard against far-reaching discovery on unfounded intent-based claims, once the defendant files such a motion for summary judgment, a plaintiff seeking discovery should be required to produce some evidence of an impermissible intent, and to show that there is a reasonable likelihood that discovery will procure evidence that would permit a jury to find in the plaintiff's favor on the intent element.[1]

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[1] Because the standards set forth above are derived from the concerns that animate the qualified immunity defense, they would apply only to damage actions against public officials in their personal capacities. No special rules should govern actions seeking prospective relief from a state official, a local official, or a local governmental entity, or damage actions against local entities. We have previously advocated a heightened pleading requirement for intent-based claims, under which the assertion of a qualified immunity defense required a plaintiff to allege specific and concrete facts raising a genuine issue regarding the objective reasonableness of the defendant's conduct. Brief for the United States at 21, *Kimberlin* v. *Quinlan*, 515 U.S. 321 (1995) (No. 93-2068). Because the two rules we advocate above afford sufficient protection against trial and discovery on unfounded intent-based claims, adoption of those rules would render it unnecessary to impose a special heightened pleading rule for intent-based claims. This case does not raise the question whether a heightened pleading rule or some equivalent protection is necessary for the distinct purpose of permitting a court to determine whether a plaintiff seeking damages from a public official has alleged a violation of a clearly established right with sufficient particularity. See, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 639-640 (1987). We continue to believe that, in order for qualified immunity to be effective, some mechanism is required to ensure that the defendant is aware at the outset of the precise nature of the clearly established right he is alleged to have violated.



**B. Summary Judgment Should Be Granted When A Public Official Shows That It Would Have Been Objectively Reasonable To Have Acted For A Legitimate Reason, And The Plaintiff Fails To Produce Clear And Convincing Evidence Of An Impermissible Intent**

1. Section 1983 does not itself prescribe any standard of proof. In such circumstances, this Court has the responsibility to formulate one. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 389 (1983); *Woodby* v. *INS*, 385 U.S. 276, 284 (1966). In exercising that responsibility in other contexts, this Court has made it clear that, "[i]n a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence." *Herman & MacLean*, 459 U.S. at 387. When the use of that standard would jeopardize important interests, however, this Court has not hesitated to impose a heightened standard. *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S.

261, 282-283 (1990) (citing cases). Because of the important governmental interests that are threatened by intent-based damage actions against public officials, when a public official asserts a qualified immunity defense and demonstrates that it would have been objectively reasonable to have acted for a legitimate reason, a heightened standard of proof at the summary judgment stage is warranted.

a. As the Court recognized in *Harlow*, ordinary summary judgment standards often do not provide an adequate mechanism for screening out unfounded allegations of impermissible intent. 457 U.S. at 815-816. Under Federal Rule of Civil Procedure 56, when a court considers a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, absent a standard of proof higher than the preponderance of the evidence standard, a plaintiff would be able to place an official's motives on trial before a jury even if the plaintiff's evidence only weakly supports an inference of improper motive, and even if all of the plaintiff's evidence is consistent with the defendant having acted with a lawful motive. As long as the plaintiff's evidence could support an inference of improper motive as well as a lawful one, the case must proceed to trial.

There are significant costs to subjecting a government official who has acted in an objectively reasonable manner to the threat of a jury trial in such circumstances. The mere prospect of a trial could adversely affect day-to-day decision-making within the government. The risks are especially great for officials in policy-making positions, because the more delicate, important, or controversial the policy decision, the greater the threat of a suit based upon weakly supported claims of improper motive becomes. "In times of political passion, dishonest or vin-



dictive motives are readily attributed * * * and as readily believed." *Harlow*, 457 U.S. at 814 n.23. The threat of trial and possible monetary liability, based upon weakly supported claims of improper intent, can easily deter officials from acting with the "decisiveness and the judgment required by the public good." *Scheuer*, 416 U.S. at 239-240.

The standard we advocate responds directly to those concerns. When officials know that they can avoid a trial and possible liability so long as they can show that it would have been objectively reasonable to have acted for a legitimate reason, and the plaintiff is unable to produce clear and convincing evidence of an impermissible intent, the danger that officials will be deterred from taking action in the public interest is sufficiently reduced.

b. An example helps to illuminate the difference between the ordinary standard and the standard we propose. Suppose an inmate engages in disruptive behavior in violation of a prison rule, and a prison official concludes that discipline is warranted. Suppose further that the official has had prior run-ins with the inmate, and that the inmate has filed one or more grievances relating to his treatment. Under ordinary standards, the prison official could not be sure of avoiding a trial and possible liability should he choose to initiate discipline, and that danger could easily deter the official from taking the action that the public interest requires.

Under the standard we propose, the situation is different. The official can show that there was an objectively legitimate reason for initiating discipline (the inmate's disruptive behavior), and the official could feel confident that the inmate's evidence could not be regarded as clear and convincing evidence of an impermissible intent. The danger that the official will be deterred from taking action in the public interest is therefore significantly reduced.

2. The imposition of a clear and convincing evidence standard for intent-based damage actions at the summary judgment stage is supported by the use of that standard in other, analogous circumstances. For example, this Court long ago held that claims to set aside a written instrument on the basis of fraud must be proven by clear and convincing evidence. *Maxwell Land-Grant Case*, 121 U.S. 325 (1887); *Snell* v. *Insurance Co.*, 98 U.S. 85, 89-90 (1878); *Atlantic Delaine Co.* v. *James*, 94 U.S. 207, 214 (1876). Those decisions have deep roots. The clear and convincing evidence standard arose in courts of equity when the chancellor faced claims that were unenforceable at law because of the Statute of Wills, the Statute of Frauds, or the parol evidence rule. *Herman & MacLean*, 459 U.S. at 388 n.27. Because of the concern that such claims would be fabricated, the chancery courts imposed a higher standard of proof. *Ibid.* That rationale was then extended to all proceedings to set aside "presumptively valid" written instruments on the ground of fraud. *Ibid.*

The situation is analogous when a plaintiff seeks to challenge an objectively reasonable decision by a public official on the ground that it was motivated by an impermissible intent. Like a claim of fraud, a claim of impermissible intent focuses on a person's state of mind and is therefore peculiarly susceptible to fabrication. As Judge Williams stated (Pet. App. 17a), "unconstitutional motivation is, as is often said of civil fraud, easy to allege and hard to disprove." Moreover, an official decision that is shown to be objectively reasonable, like a written instrument, has the hallmarks of legitimacy and therefore may be treated as "presumptively valid." The use of a clear and convincing evidence standard in the fraud context therefore supports the application of a similar standard here.

This Court has also imposed a clear and convincing evidence standard for claims of defamation by public



figures. *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991). The adoption of that standard was premised on the understanding that a standard that too easily permits the recovery of damages against those who criticize public officials could dampen public debate. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964). Similar considerations support a heightened standard here. Just as the threat of damage actions can stifle public debate, the threat of damage actions can deter public officials from exercising their discretion in the public interest. See *id.* at 282 (drawing an analogy between the two situations).

3. The standard we advocate is also supported by the principle applicable in various settings that, "in the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Most recently, in *United States* v. *Armstrong*, 116 S. Ct. 1480, 1486 (1996), the Court applied that principle to claims of selective prosecution. There, the Court held that a "presumption of regularity" supports a prosecutorial decision, and that, "[i]n order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" *Ibid.* The Court explained that prosecutors have "broad discretion" to enforce the Nation's criminal laws, and that unconstrained inquiries into the basis on which such discretion is exercised can "impair the performance" of that function. *Ibid.*

The situation is similar here. The officials at issue here perform discretionary functions, and damage actions that probe their intent for making objectively reasonable decisions can impair the performance of those functions. Thus, an official who demonstrates an objectively reasonable basis for exercising discretion should be presumed

to act in good faith and should be immune from a damage action absent "clear evidence to the contrary." *Armstrong*, 116 S. Ct. at 1486.

4. a. Petitioner's reasons for opposing a heightened standard of proof at the summary judgment stage are unpersuasive. Petitioner contends (Br. 13-14) that there is no support for a heightened standard of proof in damage actions against public officials "in the well-established common law of 1871." The common law rules on burdens of proof in existence in 1871, however, are not controlling here. Although the Court has looked to common law history in deciding who can invoke qualified immunity, *Richardson*, 117 S. Ct. at 2103, it has not limited the protections afforded by that doctrine to those available in 1871. *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987). Indeed, in *Harlow*, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Ibid.*

The Court has consistently attempted to define the protections afforded by qualified immunity in a manner that "strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167. As explained in *Harlow*, in defining the contours of the qualified immunity doctrine, "the importance of a damages remedy to protect the rights of citizens" must be balanced against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." 457 U.S. at 807. In *Harlow*, the Court held that, in order to strike the appropriate balance, qualified immunity should not be defeated by an



allegation of malice and that the immunity vests when an official has acted in an objectively reasonable manner. *Id.* at 817-818. The question here is how the balance that *Harlow* already struck should apply in the context of a cause of action that turns on an allegation of impermissible intent. Contrary to petitioner's suggestion, it is well within this Court's authority to resolve that question.

Moreover, as discussed above, because Congress has not specified the standard of proof for Section 1983 actions (or for the federal common law analogue under *Bivens*), this Court has the responsibility to prescribe one. In specifying the standard of proof when Congress has failed to do so, the Court has not rigidly followed common law practice. Instead, it has adopted the standard that best accommodates the competing interests. *Herman & MacLean*, 459 U.S. at 388-390; *Woodby*, 385 U.S. at 284-286. Petitioner's reliance on the absence of a settled common law practice requiring proof of clear and convincing evidence in cases seeking damages from public officials is therefore misplaced.

b. Petitioner also contends (Br. 14) that changes in summary judgment law since *Harlow* make it unnecessary to impose a higher standard of proof in order to weed out insubstantial allegations of intent. In particular, following *Harlow*, the Court held in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986), that summary judgment may be granted against a non-moving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Thus, under *Celotex*, "the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage." *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring).

The same day this Court decided *Celotex*, however, it held in *Anderson* that a clear and convincing evidence

standard applies at the summary judgment stage to defamation actions by public figures. 477 U.S. at 255-256. The lesson of *Anderson* is that the protection afforded by *Celotex*, while significant, is not a substitute for a heightened standard of proof. That is true in the present context for two reasons.

First, absent a heightened standard of proof, even plaintiffs with insubstantial claims of impermissible intent can often cobble together evidence that would preclude a district court from granting summary judgment. For example, even when an official can demonstrate an objectively reasonable basis for a decision, it would not be unusual for an inmate to be able to produce evidence of a prior run-in, an intemperate remark, or another superficially similar case that had been treated differently. Under ordinary standards, regardless of how unfounded the allegations of impermissible motive, such evidence could preclude the grant of summary judgment. Thus, even with the benefit of *Celotex*, public officials will often be unable to weed out insubstantial claims at the summary judgment stage without the addition of a heightened standard of proof.

Second, in order for officials to act with the decisiveness required by the public interest, they must be able to predict with a reasonable degree of confidence when they may be subject to a trial and possible liability. *Davis*, 468 U.S. at 195. There is likely to be a significant disparity, however, in how different judges apply the summary judgment standard under the preponderance of the evidence standard. And that unpredictability would prevent officials from ever knowing when they might be subject to a trial on an insubstantial claim. This case is illustrative. Although Judge Henderson viewed the allegations of intent in this case as frivolous, Pet. App. 72a, the district court and five members of the en banc court viewed petitioner's asserted evidence as sufficient to permit a jury to infer an impermissible intent under a preponderance standard, *id.* at 93a-94a. *Celotex* simply cannot furnish the degree of predictability that is necessary to serve *Harlow*'s goals.



c. Finally, petitioner contends (Br. 10) that the adoption of a heightened standard of proof would "create, for a particular category of claims, qualified immunity that borders on absolute immunity." The clear and convincing evidence standard, however, has been applied in numerous other contexts, including in deportation proceedings, denaturalization proceedings, civil commitment proceedings, termination of parental rights, civil fraud, lost wills, and oral contracts to make bequests. *Cruzan*, 497 U.S. at 282-283. There is no evidence that the application of that standard has led to anything approaching absolute immunity in those suits.

### C. A Plaintiff Seeking Discovery Should Be Required To Produce Some Evidence Of An Impermissible Intent, And Show That There Is A Reasonable Likelihood That Discovery Will Procure Evidence That Would Permit A Jury To Find In The Plaintiff's Favor

1. As *Harlow* explained, predicating liability on intent not only makes it difficult to weed out insubstantial claims on summary judgment, it also creates the potential for "broad-ranging discovery" that "can be peculiarly disruptive of effective government." 457 U.S. at 817. If a plaintiff faced with a summary judgment motion advancing an objectively reasonable basis for the conduct had an unrestricted right to seek far-reaching discovery on the intent issue—and thereby postpone the resolution of the summary judgment motion until such discovery is completed—those same concerns would arise. We do not agree with Judge Williams (Pet. App. 13a), however, that the

appropriate response is to preclude discovery in all cases until the summary judgment motion is resolved. Because critical evidence on the intent issue may sometimes be in the possession of the defendant or others, that approach would threaten to choke off too many meritorious claims. It would also create unnecessary tension with Federal Rule of Civil Procedure 56(f), which expressly gives a district court discretion to "order a continuance to permit * * * discovery to be had" when a party opposing a summary judgment motion "cannot for reasons stated [in an affidavit] present by affidavit facts essential to justify the party's opposition."

The approach we advocate is derived from Judge Ginsburg's concurring opinion below and the Seventh Circuit's decision in *Elliott*, *supra*. Once a defendant files a motion for summary judgment, a plaintiff should be permitted to obtain discovery prior to the resolution of the motion only if the plaintiff can (1) produce "some evidence" of impermissible intent, *Elliott*, 937 F.2d at 345, and (2) show that there is a "reasonable likelihood" that "discovery will uncover evidence sufficient to sustain a jury finding in the plaintiff's favor," Pet. App. 63a (Ginsburg, J.). Those requirements provide adequate protection for government officials against improvident discovery, while still leaving room for discovery in meritorious cases.

The requirement of "some evidence" is identical to the one this Court approved in *Armstrong* as a prerequisite to discovery on a selective prosecution claim. 116 S. Ct. at 1488. Although plaintiffs seeking discovery need not produce evidence that would itself support a jury finding in their favor on the intent issue, they must make a "substantial threshold showing" of impermissible intent. *Ibid.*

To satisfy the "reasonable likelihood" requirement, it is not sufficient to show that discovery will "buttress" the



plaintiff's claim. Pet. App. 63a (Ginsburg, J). If the requirement were framed in that way, discovery would be authorized any time the plaintiff could show a reasonable likelihood of uncovering evidence that would make the plaintiff's case marginally stronger than it was before. The standard we advocate erects a higher hurdle. The evidence sought, when combined with the evidence in hand, must be sufficient to support a jury finding in the plaintiff's favor. Nor is it permissible for the plaintiff to "paint only with a broad and speculative brush." *Ibid.* (Ginsburg, J.). The plaintiff must have a concrete basis for believing that discovery will uncover the necessary evidence.

2. The limitations on discovery we propose are consistent with Rule 56(f). While that Rule gives a district court discretion to permit discovery prior to ruling on a summary judgment motion, "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 416 (1975) (quoting *United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d) (Marshall, C.J.)). Because Rule 56(f) does not itself specify the legal principles that should govern the district court's exercise of discretion, those principles must be derived from other sources. *Elliott*, 937 F.2d at 345. Here, the legal principles that govern the district court's exercise of discretion under Rule 56(f) must be informed by the concerns that animated this Court's decision in *Harlow*. As the Seventh Circuit stated in *Elliott*, "[i]f a rule of law crafted to carry out the promise of *Harlow* requires the plaintiff [to make certain showings before obtaining discovery], and the plaintiff fails to do so, then Rule 56(c) allows the court to grant the motion for summary judgment without ado." 937 F.2d at 345. Any district court order that fails to take into

account "the social costs" associated with discovery on intent-based claims constitutes an "abuse of discretion." Pet. App. 62a (Ginsburg, J.).

Federal Rule of Civil Procedure 26(b)(2) reinforces the conclusion that such costs must be considered. It provides that discovery "shall be limited" when the court determines that "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2). Once a public official files a motion for summary judgment on an intent-based claim, unless the plaintiff can introduce some evidence of impermissible intent and show that discovery is reasonably likely to uncover sufficient evidence to support a jury finding in the plaintiff's favor, "'the burden * * * of the proposed discovery" categorically "outweighs its likely benefit."[2]

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[2] Courts applying Rules 56(f) and 26(b)(2) outside the present context have imposed limitations on the district court's discretion to permit discovery after a motion for summary judgment has been filed. See, *e.g.*, *Fennell* v. *First Step Designs, Ltd.*, 83 F.3d 526, 531 (1st Cir. 1996) (requiring a "plausible basis" for concluding discovery will raise a "trial worthy issue"); *Price* v. *General Motors Corp.*, 931 F.2d 162, 164 (1st Cir. 1991) (same). To the extent that those decisions may suggest that a district court has more leeway to permit discovery in other contexts, the special concerns articulated in *Harlow* justify the limitations we have proposed for intent-based damage actions against public officials.



## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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